

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Aaron Michael Rose,

10 Petitioner,

11 v.

12 Ryan Thornell, et al.,

13 Respondents.  
14

No. CV-23-02152-PHX-KML

**ORDER**

15 Petitioner Aaron Michael Rose was convicted in state-court of two counts of sexual  
16 conduct with a minor. After not obtaining relief in state court, Rose filed a federal petition  
17 for writ of habeas corpus. The magistrate judge issued a Report and Recommendation  
18 (“R&R”) that concludes Rose is not entitled to relief. Rose filed objections to portions of  
19 the R&R but he also filed a motion to amend his petition and a motion to stay this case  
20 while he attempts to obtain relief again in state court. The R&R is correct, and Rose is not  
21 entitled to amend his petition nor to a stay. Rose’s petition is denied and dismissed with  
22 prejudice.

23 **I. Background**

24 After his convictions Rose was sentenced to two consecutive terms of life in prison.  
25 Rose filed a direct appeal and after that was unsuccessful, he filed in state court a petition  
26 for post-conviction relief. The state court held an evidentiary hearing on that petition but  
27 denied relief. The Arizona Court of Appeals affirmed that denial. On October 7, 2022, the  
28 Arizona Supreme Court denied review. On October 10, 2023, Rose filed his federal habeas

1 corpus petition. (Doc. 1.)

2       Rose’s initial petition contained only two claims, one alleging ineffective assistance  
3 of counsel involving Rose’s decision not to testify at his trial, and one based on the  
4 admission of evidence involving a juvenile adjudication. Respondents initially argued the  
5 petition was untimely. (Doc. 12.) No ruling was made on timeliness before May 7, 2024,  
6 when respondents withdrew their timeliness argument and conceded “Rose’s habeas  
7 petition is timely.” (Doc. 27 at 1.)

8       On May 16, 2024, Rose sought leave to amend his petition to include six additional  
9 claims. (Doc. 29.) On June 6, 2024, Magistrate Judge Eileen S. Willett granted Rose leave  
10 to amend. (Doc. 42.) Rose’s amended petition was filed and respondents filed a response  
11 to that petition. (Docs. 43, 45.) The response argued the two claims in the initial petition  
12 were timely but the “six additional claims raised in [the] amended habeas petition do not  
13 relate back . . . and are untimely.” (Doc. 45 at 6.)

14       On October 10, 2024, Magistrate Judge Willett issued a Report and  
15 Recommendation (“R&R”) recommending the court deny relief on all eight claims.  
16 According to the R&R, the first claim involving ineffective assistance of trial counsel fails  
17 on the merits, the second claim is procedurally defaulted, and the six additional claims are  
18 untimely. About two weeks after the R&R was filed, Rose filed three motions. The first  
19 sought clarification on when Rose’s objections to the R&R were due. (Doc. 49.) The  
20 second sought to amend the petition to delete the six claims Rose added in his amended  
21 petition. (Doc. 51.) The third asked the court to stay the case so Rose could return to state  
22 court to present the “unexhausted” six claims he added in his amended petition. (Doc. 50.)

23       Approximately one week after filing his three motions, Rose filed objections to the  
24 R&R. In those objections, Rose only addresses the R&R’s analysis of his first claim  
25 involving ineffective assistance of counsel. Rose argues the state court denied relief on that  
26 claim based on the “self-serving statements” Rose’s trial counsel made at the post-  
27 conviction evidentiary hearing. (Doc. 52 at 2.) Rose seems to believe the court should find  
28 the state court’s determination that those statements were credible was error. While Rose’s

1 objections do not mention the R&R's conclusion that his evidentiary claim was  
 2 procedurally defaulted and his six other claims are untimely, his request to amend his  
 3 petition and stay this case suggest he does not wish to pursue the unexhausted claims at  
 4 this time.

## 5 **II. Analysis**

6 The motion to amend and motion to stay that Rose filed after the R&R must be  
 7 addressed first because if those motions were granted, it would be premature to rule on the  
 8 R&R.

### 9 **A. Motions to Amend and Stay**

10 The motion to amend and motion to stay involve Rose's attempt to pursue relief  
 11 based on the six claims he added in his amended petition. Rose concedes those six claims  
 12 were not exhausted in state court and he now wishes to pursue those claims there. To do  
 13 so, Rose hopes to pursue the three-step procedure set forth in *Kelly v. Small*, 315 F.3d 1063  
 14 (9th Cir. 2003). Those three steps are “(1) a petitioner amends his petition to delete any  
 15 unexhausted claims; (2) the court stays and holds in abeyance the amended, fully exhausted  
 16 petition, allowing the petitioner the opportunity to proceed to state court to exhaust the  
 17 deleted claims; and (3) the petitioner later amends his petition and re-attaches the newly-  
 18 exhausted claims to the original petition.” *King v. Ryan*, 564 F.3d 1133, 1135 (9th Cir.  
 19 2009). This procedure is only available if the “newly-exhausted claims” would relate back  
 20 to the original petition. *Id.* at 1143. The six claims Rose wishes to delete from the current  
 21 petition, exhaust in state court, and add back into his federal petition would not relate back  
 22 to his original claims.

23 Rose's six claims will relate back only if those six claims “and the original claims  
 24 [are] tied to a common core of operative facts.” *Walden v. Shinn*, 990 F.3d 1183, 1202 (9th  
 25 Cir. 2021) (quotation marks and citation omitted). The “common core of operative facts”  
 26 cannot simply be Rose's underlying criminal proceedings. *Mayle v. Felix*, 545 U.S. 644,  
 27 664 (2005). Instead, the six claims and the original claims must be based on “a single course  
 28 or pattern of conduct—not factually and temporally unrelated conduct arising out of the

1 same underlying proceeding.” *Walden*, 990 F.3d at 1202 (quotation marks and citation  
2 omitted). Rose’s six claims are factually and temporally distinct from his original claims.

3       Rose’s original two claims were ineffective assistance of counsel based on advice  
4 given to Rose whether to testify and an issue involving the admission at trial of evidence  
5 that Rose had been adjudicated delinquent when he was fourteen. Of the six claims he  
6 wishes to delete, exhaust in state court, and add back later, four of the claims involve  
7 “prosecutorial misconduct by witness vouching,” one involves ineffective assistance of  
8 counsel based on counsel failing “to request a preliminary question hearing,” and one is a  
9 claim of “cumulative error of prosecutorial misconduct combined with [ineffective  
10 assistance of counsel].” (Doc. 47 at 6.) The first five of these claims do not involve any  
11 aspect of counsel’s advice regarding Rose’s choice to testify nor do they involve the  
12 admissibility of evidence regarding his delinquency adjudication. Some of the first five  
13 claims involve different actors than the original claims and all five involve different issues  
14 that arose at different times than Rose’s original claims. These claims therefore do not  
15 relate back. *See Hebner v. McGrath*, 543 F.3d 1133, 1138-39 (9th Cir. 2008).

16       The sixth of Rose’s new claims is based on “cumulative error.” (Doc. 43 at 34.) The  
17 alleged “cumulative error” involves the alleged errors in Rose’s original claims but also all  
18 the errors in the five claims Rose added in his amended petition. Rose cannot cumulate  
19 errors that do not relate back. *See Nordlof v. Clark*, No. C 07-4899 MMC (PR), 2010 WL  
20 761294, at \*9-\*10 (N.D. Cal. Mar. 3, 2010). And as discussed below, Rose’s original claim  
21 of ineffective assistance of counsel fails on the merits. The failure of that claim combined  
22 with the relation-back doctrine means there is not even arguably more than one error to  
23 cumulate from the original claims. Rose may not add a cumulative error claim.

24       Five of the six claims are not sufficiently related to the original claims to allow for  
25 application of the relation-back doctrine and the sixth claim fails because there are not  
26 multiple errors to cumulate. In these circumstances, Rose is not entitled to pursue the three-  
27 step *Kelly* procedure. The motion to amend and motion to stay are denied.

28

1           **B. Adopting the R&R**

2           A district judge “may accept, reject, or modify, in whole or in part, the findings or  
3 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b). The district court  
4 must review de novo the portions to which an objection is made. *Id.* The district court  
5 need not, however, review the portions to which no objection is made. *See Schmidt v.*  
6 *Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003) (“[D]e novo review of factual and  
7 legal issues is required if objections are made, but not otherwise.”) (quotation marks and  
8 citation omitted).

9           Rose’s objections do not identify any flaw in the R&R’s analysis of his first claim  
10 alleging ineffective assistance of counsel. Rose’s objections argue the state court should  
11 not have credited testimony from his counsel regarding the advice she provided to him.  
12 (Doc. 52 at 2.) But the R&R explained the high bar Rose needed to meet for the court to  
13 reject the state court’s acceptance of that testimony. (Doc. 48 at 8.) Rose’s objections do  
14 not explain how the R&R erred on this point. *See Miller-El v. Cockrell*, 537 U.S. 322, 340  
15 (2003) (state court’s finding must be accepted unless it was “objectively unreasonable in  
16 light of the evidence presented in the state-court proceeding”). Rose’s first claim for  
17 ineffective assistance of counsel fails.

18           Rose did not object to the R&R’s conclusion that his second claim is not cognizable  
19 and, in any event, procedurally defaulted. Therefore, the court need not analyze that issue  
20 and the R&R is adopted on that point.

21           Finally, the court has already concluded the six claims added in the amended  
22 petition do not relate back and are untimely. The R&R’s analysis of this issue is also  
23 accepted, including its analysis of equitable tolling and actual innocence. (Doc. 48 at 18-  
24 20.)

25           Accordingly,

26           **IT IS ORDERED** the Request for Clarification (Doc. 49) is **GRANTED** and  
27 petitioner’s objections (Doc. 52) are accepted as timely.

28           **IT IS FURTHER ORDERED** the Motion to Stay (Doc. 50) and Motion to Amend

1 (Doc. 51) are **DENIED**.

2 **IT IS FURTHER ORDERED** the Report and Recommendation (Doc. 48) is  
3 **ADOPTED IN FULL**. The amended petition is **DENIED** and **DISMISSED**. The Clerk  
4 of Court shall enter judgment in favor of respondents.

5 **IT IS FURTHER ORDERED** leave to proceed in forma pauperis and a certificate  
6 of appealability are **DENIED** because dismissal of the petition is justified by a plain  
7 procedural bar and reasonable jurists would not find the ruling debatable, and because  
8 Petitioner has not made a substantial showing of the denial of a constitutional right.

9 Dated this 7th day of February, 2025.

10  
11   
12 \_\_\_\_\_  
13 **Honorable Krissa M. Lanham**  
14 **United States District Judge**  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28